90-535

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1990

JUWHAN YUN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fifth Amendment and/or a federal court's supervisory powers prohibit the government from launching a "sting" operation at a targeted individual without any basis for believing that the target of the operation was predisposed to wrongdoing, planning to engage in wrongdoing and/or actually engaged in wrongdoing?

2. Whether petitioner in this case was entrapped as a matter of law?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
A. Procedural History	3
B. Statement of the Facts	3
Reasons for Granting the Writ	4
I. This Court should grant certiorari to resolve a conflict among the Circuits as to whether the government may target an individual for a "sting" operation without any evidence that the targeted individual is predisposed to criminal activity, planning to engage in criminal activity or actually engaged in criminal activity.	4
A. Factual Setting	4
B. Legal Argument	7

Contents

Page

C. Conclusion 13

II. Petitioner in this matter was entrapped as a matter of law since there was insufficient evidence of predisposition. 14

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) 15

Greene v. United States, 455 F.2d 783 (9th Cir. 1971) 13

Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976) 12, 13

Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 546, 72 L. Ed. 2d 944 (1928) 11

Sorrells v. United States, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932) 15

United States v. Driscoll, 852 F.2d 84 (3rd Cir. 1988) 8

United States v. Gamble, 737 F.2d 853 (10th Cir. 1984) 8

Contents

Page

United States v. Jacobson, 893 F.2d 999, opinion and judgment vacated and rehearing granted, 899 F.2d 1549 (8th Cir. 1990) 8, 9, 10, 13, 14

United States v. Jannotti, 673 F.2d 578 (3rd Cir. 1982) cert. denied, 457 U.S. 1106 (1982) 7, 8, 15

United States v. Jenrette, 144 F.2d 817 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099, 105 S. Ct. 2321, 85 L. Ed. 2d 840 (1985) 8

United States v. Luttrell, 889 F.2d 806 (9th Cir. 1989) 8, 10, 11, 12, 14

United States v. Myers, 692 F.2d 823 (2nd Cir. 1982), cert. denied, 461 U.S. 961, 103 S. Ct. 2438, 77 L. Ed. 2d 1322 (1983) 8

United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973) 12

United States v. Steinhorn, 739 F. Supp. 268 (D. Md. 1990) 8, 12

United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) 13

United States v. Yun, 718 F. Supp. 366 (D.N.J. 1989) 2, 3, 7, 10, 14

Statutes Cited:

18 U.S.C. § 371 3

Contents

Page

18 U.S.C. § 3231 2

22 U.S.C. § 2778(b)(2) 3

28 U.S.C. § 1254(1) 2

United States Constitution Cited:

Fifth Amendment 2

Rule Cited:

Supreme Court Rule 10 14

Other Authorities Cited:

Gersham, Abscam, the Judiciary, and the Ethics of Entrapment, 91 Yale L.J. 1565 (1982) 8

Comment, 133 U. Pa. L. Rev. 1193 (1985) 8

Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice, S. Rep. No. 682, 97th Cong., 2nd Sess. 13 (1982) 14

APPENDIX

Appendix A — Order of the Supreme Court of the United States Dated July 12, 1990 ..... 1a

Appendix B — Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated April 27, 1990 ..... 2a

Contents

Page

Appendix C — Judgment Order of the United States Court of Appeals for the Third Circuit Dated March 29, 1990 ..... 4a

Appendix D — Opinion of the United States District Court, District of New Jersey, Dated July 18, 1989 ..... 6a

Appendix E — Judgment and Sentence of the United States District Court, District of New Jersey Filed September 20, 1989 ..... 34a

No.

In The

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JUWHAN YUN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Juwhan Yun prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction entered by the trial court.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey denying petitioner's post-verdict motions for a new

trial and/or a judgment of acquittal is reported. *United States v. Yun*, 718 F. Supp. 366 (D.N.J. 1989) (Opinion reproduced at 6a-33a). The judgment order of the United States Court of Appeals for the Third Circuit, entered March 29, 1990, is not reported.

STATEMENT OF JURISDICTION

Petitioner seeks a writ of certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit entered in this matter on March 29, 1990 (4a).[1] The District Court entered its judgment of conviction on September 18, 1989 and sentenced petitioner to a 30-month term of imprisonment to be followed by a period of supervised release and a special assessment of $50 (36a). Petitioner is presently serving that sentence. The District Court had subject-matter jurisdiction pursuant to 18 U.S.C. § 3231. A petition for panel re-hearing and suggested re-hearing en banc was denied by the Third Circuit on April 27, 1990 (2a). This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This matter implicates the Due Process Clause of the Fifth Amendment.

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1. References to "a" are to the pages of the appendix annexed to this petition. The appendix filed in the Third Circuit consists of five volumes designated Volumes A-E. The pages in Volume A are sequentially numbered from "a-1" through "a-159." Volumes B through E are the trial transcripts and bear only the original sequential pagination, which reflects the transcript volume number and page. Thus, a reference to, for example, "App. B 1.64" would be to page 64 of Volume 1 of the trial transcript as found in Volume B of the Third Circuit appendix.

STATEMENT OF THE CASE

A. Procedural History.

On January 20, 1989, Juwhan Yun and Charles Caplan were charged in two counts by a federal grand jury in the District of New Jersey with, count one, a conspiracy to violate the Arms Export Control Act by knowingly agreeing to export a defense article — the nerve gas Sarin — without the licenses required by law, in violation of 18 U.S.C. § 371; and, count two, an attempt to export Sarin without a license, in violation of 22 U.S.C. § 2778(b)(2) (a-9). Since co-defendant Caplan was a resident of Great Britain at the time of the indictment, and since that nation does not permit extradition for conspiracy or attempt, Yun was tried alone. He was found guilty on count one by a jury following a three-week trial. He was acquitted by the jury on count two. The United States District Court denied petitioner's post-verdict motion for a judgment of acquittal or, alternatively, for a new trial. *United States v. Yun*, 718 F. Supp. 366 (D.N.J. 1989). On September 18, 1989, he was sentenced to a term of imprisonment of 30 months (36a). The conviction was affirmed by a judgment order of the Third Circuit on March 29, 1990[2] (4a). On April 27, 1990, the Third Circuit denied petitioner's petition for panel re-hearing and suggestion for re-hearing en banc (2a). On July 12, 1990 Justice Brennan extended the time for filing this petition to September 24, 1990 (1a).

B. Statement of the Facts.

The facts of this matter are inextricably bound up with the

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2. The judgment order erroneously recites that the matter was argued March 16, *1988*. In truth, the matter was argued March 16, *1990*, 13 days before the judgment order issued.

legal arguments. Discussion of the facts will be reserved to those arguments.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE GOVERNMENT MAY TARGET AN INDIVIDUAL FOR A "STING" OPERATION WITHOUT ANY EVIDENCE THAT THE TARGETED INDIVIDUAL IS PREDISPOSED TO CRIMINAL ACTIVITY, PLANNING TO ENGAGE IN CRIMINAL ACTIVITY OR ACTUALLY ENGAGED IN CRIMINAL ACTIVITY.

A. Factual Setting.

Petitioner in this matter, Juwhan Yun, is a naturalized American citizen of Korean ancestry. In 1972, at age 32, he emigrated to the United States having previously earned a degree at Seoul National University in Seoul, Korea (App. C. 6.22). In 1976, after several years of employment with the 3M Company, he started a business that eventually became known as Komex International, a company that exports industrial products from the United States, primarily machinery, chemicals and military components (App. C. 6.26; 7.44). The overwhelming majority of Yun's business — 99 percent — was with the government of his native land, the Republic of Korea (South Korea) (App. C. 6.30).

At the time of his arrest, petitioner Yun resided with his wife of 17 years, their three native-born children and his 83-year old mother in Short Hills, New Jersey (App. C. 6.21). He had never before been arrested or charged with criminal conduct.

In the beginning of 1988, Yun received an arms inquiry from a friend of 30 years, Mr. K.Y. Joo. Joo was seeking a supplier for the government of South Korea of 105/106mm ammunition and told Yun that if he succeeded in finding a reliable source, Yun could become the exclusive supplier of the ammunition for the South Korean government (App. C. 6.30-6.32). In response to Joo's query, Yun searched diligently for such a supplier and eventually came across the name of CIC International in a publication known as the National Defense Annual Special Edition and, on June 24, 1988, phoned CIC regarding 105/106 ammunition. The gentleman he spoke to, Mr. DeArman, was a former U.S. Customs employee who testified at trial that even though the export of 105/106 ammunition to the South Korean government was legal, he was suspicious of Yun because of his Oriental accent and his lack of familiarity with the argot of arms dealing (App. B. 1.67-1.69). Without further investigation, DeArman contacted a former supervisor in the U.S. Customs Service. Several days later DeArman spoke with Agent Richard Kennan of Customs. Customs conducted no preliminary investigation. Instead, on June 27, 1988 Agent Kennan phoned Yun and launched the baseless sting operation which is the subject of this petition. Kennan told Yun that his name was Richard Moyes and that he was president of a trading company which operated as the export arm of CIC and could meet Yun's 105/106 requirements (App. B. 1.96-1.97).

In summarizing the situation as it existed prior to the first investigative contact between the United States government and Mr. Yun, the United States District Court for the District of New Jersey made these findings of facts and observations:

> In this case, the defendant made an inquiry about a legal transaction for which he had a license from the federal government. In making the inquiry, he disclosed his name, address and telephone number.

Those circumstances alone launched the undercover investigation. There is no evidence that the defendant would have or could have pursued the purchase of the illegal item for which he was eventually charged but for the intervention of the government agent. Indeed, the jury verdict [guilty of conspiracy; not guilty of attempt] reflects a conviction of the defendant primarily for what he said, rather than what he did.

Although the actions of the agent clearly raised the issue of entrapment, the jury rejected that defense and the court will not interfere with the jury's findings in this regard. However, the court fears that the absence of any established minimum standards for the commencement of an undercover operation places innocent persons in jeopardy and dilutes every citizen's right of privacy.

Should a government agent acting in an undercover capacity be permitted to attempt to engage someone in criminal activity when the government possesses no information that such person ever was, is now, or intends to be engaged in *any* criminal activity? Should our government be permitted, through subterfuge and deceit, to seek out a law-abiding citizen for the sole purpose of testing whether or not such person will engage in illegal conduct?

Were it not for the actions of the agent, it is unlikely that the defendant would have committed the crime for which he was convicted. However, the jury found the defendant was predisposed, and thus not entrapped. No authority now exists which would permit this court to find that the mere

> initiation of the investigation violated defendant's due process rights.
>
> Moreover, the conduct of the agent, although offensive and objectionable in many respects throughout the course of the investigation, was not so outrageous as to permit or require this court to set aside the jury's verdict of guilt.

United States v. Yun, 718 F. Supp. at 367-68 (6a-7a).

The trial judge thus found the necessary factual predicate to the first question presented by this petition for certiorari, namely whether the government may initiate an investigation of a citizen, induce the citizen to engage in criminal activity and thereafter prosecute, convict and jail that citizen, with no prior information that the citizen was predisposed to, or actually engaged in, criminal activity. Indeed, the facts of this case starkly reveal a disturbing set of circumstances where, as found by the trial judge, "Were it not for the actions of the agent, it is unlikely that the defendant would have committed the crime for which he was convicted," and that there was "no evidence that the defendant would have or could have pursued the purchase of the illegal item for which he was eventually charged, but for the intervention of the government agent." *Id.*

B. Legal Argument.

The issue of whether the government's targeting decision can violate due process currently divides the United States Courts of Appeals. For example, in *United States v. Jannotti,* 673 F.2d 578 (3rd Cir. 1982), *cert. denied,* 457 U.S. 1106 (1982), a case which arose out of the Abscam investigation of members of congress, the court stated, "It is *inconsequential* whether law enforcement officials did or did not act on *well-grounded suspicion* that the defendant was engaging in wrongdoing, or whether they had

probable cause for approaching the defendant." 673 F.2d at 609. (Emphasis in original.) In *United States v. Driscoll,* 852 F.2d 84 (3rd Cir. 1988), the court rejected an appeal on due process grounds of a defendant who had been convicted of receiving child pornography through the mail. The *Driscoll* court followed *Jannotti* and concluded that it was of no legal significance that government agents had no basis for targeting the defendant in that case. For other cases rejecting the "reasonable suspicion" argument, *see e.g., United States v. Jenrette,* 144 F.2d 817, 823-24 and n. 13 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1099, 105 S. Ct. 2321, 85 L. Ed. 2d 840 (1985); *United States v. Gamble,* 737 F.2d 853, 856-60 (10th Cir. 1984); *United States v. Myers,* 692 F.2d 823, 836-37 (2nd Cir. 1982), *cert. denied,* 461 U.S. 961, 103 S. Ct. 2438, 77 L. Ed. 2d 1322 (1983); *United States v. Steinhorn,* 739 F. Supp. 268 (D. Md. 1990). For a criticism of these cases, *see* Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment,* 91 Yale L.J. 1565 (1982); Comment, 133 U. Pa. L. Rev. 1193 (1985) (entrapment defense should be replaced with "reasonable suspicion" requirement to initiate investigation).

In contrast to the above line of cases, are *United States v. Luttrell,* 889 F.2d 806 (9th Cir. 1989) and *United States v. Jacobson,* 893 F.2d 999, *opinion and judgment vacated and re-hearing granted,* 899 F.2d 1549 (8th Cir. 1990). In each of these cases, the court recognized a reasonable suspicion threshold to the initiation of sophisticated government sting operations that target a specific individual.

The defendant in *Jacobson* had ordered through the mails two nudist magazines an act which the court concluded "did not violate any law." 893 F.2d at 1000.[3] Jacobson came to the

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3. Although, as noted, the panel opinion and judgment in *Jacobson* have been vacated pending a re-hearing, the published opinion well illustrates the continuing difficulty this question presents to the lower courts.

government's attention when a search warrant was executed on the company premises from where the nudist magazines had been ordered. As noted by the court, "The government had no other information at the time that Jacobson was purchasing through the mails, or producing, child pornography, or that he was predisposed to either." *Id.* The following scenario ensued:

> Nevertheless, the government made Jacobson the target of five undercover sting operations over a period of 2½ years. Various postal inspectors surreptitiously contacted Jacobson more than 11 times. Jacobson answered a survey sent to him during the first undercover operation. In his response, he indicated a predisposition to receive through the mails sexually explicit materials depicting children. After several opportunities to purchase such materials under government observation, Jacobson ordered "Boys who Love Boys," a magazine containing sexually explicit materials depicting minors. After sending him this publication, government agents arrested Jacobson and searched his home. No other illegal materials were found.

Id. The *Jacobson* panel rejected the government's arguments that the purchase of the two nudist magazines indicated a predisposition to purchase illegal child pornography. The court concluded that the purchase of legal materials was not evidence of predisposition and "did not give rise to reasonable suspicion based on articulable facts that Jacobson had committed a crime in the past or was likely to commit a crime in the future . . ." *Id.* The court concluded, as a matter of law, as follows:

> [T]he government must have reasonable suspicion based on articulable facts before instituting an

undercover operation directed at a person . . . .

Id.

The findings made by the *Jacobson* panel are identical with those made by Judge Sarokin in his opinion in this case. In *both* cases, the courts concluded that at the time the undercover operation was commenced, the government had no evidence — let alone a reasonable suspicion — that either defendant had engaged in criminal conduct or was about to engage in criminal conduct or was even predisposed to criminal conduct. *Compare Jacobson,* 893 F.2d at 1000 and Yun, 718 F. Supp. at 367 (7a). The rhetorical question posed by Judge Sarokin bears repeating:

> Should a government agent in an undercover capacity be permitted to attempt to engage someone in criminal activity when the government possesses no information that such person ever was, is now, or intends to be engaged in *any* criminal activity? Should our government be permitted, through subterfuge and deceit, to seek out a law-abiding citizen for the sole purpose of testing whether or not such person will engage in illegal conduct?

United States v. Yun, 718 F. Supp. at *id.* In *Yun*, the court concluded that, "No authority now exists which would permit this court to find that the mere initiation of the investigation violated defendant's due process rights." *Id.* at 368. *Luttrell* and *Jacobson* were both decided after *Yun.*

The situation in *United States v. Luttrell* further illustrates the persistent and recurring nature of this troubling problem. In setting the stage for its ruling, the Ninth Circuit made the following threshold findings:

> [A]s our review has revealed, there is absolutely no evidence on the trial record that the Secret Service possessed any information linking the appellants or their business with illegal activity. Nor is there even any testimony on the record that the police were aware of criminal activity involving unknown members of a discrete class or group of which appellants might be a part.

United States v. Luttrell, 889 F.2d at 812. Under those circumstances, the *Luttrell* court reached the following conclusion:

> We think that police officers violate constitutional norms when, without reasonable grounds, they approach apparently innocent individuals and provide them with a specific opportunity to engage in criminal conduct. Appellants have struck a familiar chord with their theory of permissible limits of government conduct. Rooted in the Bill of Rights is a concept that the processes of criminal investigation move deliberately, purposefully and fairly. The Fourth Amendment, for instance, explicitly requires probable cause; the requirements of substantive due process are more flexible, but there is nothing in the Fifth Amendment which diminishes "the right to be left alone — the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). The principle that people who are scrupulously conforming to the requirements of the law should not be made the objects of highly intrusive, random police investigation is an important ingredient of our

> liberty. We see substantial mischief in any pattern of law enforcement that arbitrarily targets for intrusion the lives of individuals who, to all reasonable appearances, are minding their own business.

United States v. Luttrell, 889 F.2d at 813. (Footnotes omitted.)

In *United States v. Steinhorn,* 739 F. Supp. 268 (D. Md. 1990), the question again presented itself. In that case, an informant awaiting sentencing on state criminal charges approached the FBI with information that his attorney had offered to exchange the informant's stolen gold jewelry and money for "clean" cash. *Id.* at 269-70. Defendant argued later that the government lacked reasonable suspicion to target him. The government argued in the alternative that, on the one hand it did not require any level of suspicion to initiate the undercover operation and, on the other hand, it possessed reasonable suspicion. *Id.* at 271. The District Court judge in *Steinhorn* accepted both arguments.

The due process argument urged in this case finds its origins in *United States v. Russell,* 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973) and *Hampton v. United States,* 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976). In *Russell,* this Court concluded that there would be no entrapment defense where a defendant was predisposed to criminal activity even if the government furnished a necessary ingredient for the crime. *Russell,* 411 U.S. at 433-36, 93 S. Ct. at 1643-45. This Court did, however, warn that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32, 93 S. Ct. at 1642-43.

The due process argument was refined in *Hampton* where the government furnished an illicit drug which the defendant then sold to a government informant. In essence, the defendant was nothing but a middle man in a transaction between government agents. Noting the defendant's undeniable predisposition to drug dealing, however, the *Hampton* Court affirmed the conviction. Justices Powell and Blackmun concurred in the opinion, but took issue with the plurality's conclusion that due process plays no role in the area of government/defendant criminal activity. Justice Powell declared that he was "unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." *United States v. Hampton*, 425 U.S. at 494-95, 96 S. Ct. at 1652-53 (Powell, J., concurring) (citations omitted).

Since *Hampton*, two Circuits have reversed convictions on the basis of outrageous government conduct. *See United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *Greene v. United States*, 455 F.2d 783 (9th Cir. 1971). In both cases, despite ample evidence of predisposition, the courts of appeals concluded that the government had so enmeshed itself in the criminal activity as to have virtually created it. In *Greene*, the government set up and maintained a bootlegging operation for more than 2½ years. In *Twigg*, government agents supplied every necessary ingredient for the manufacture of the illicit drug at issue. Government agents also taught the defendants how to manufacture the drug.

C. Conclusion.

It is no burden on law enforcement that it refrain from testing the willingness of citizens to engage in crime unless the government has some reasonable suspicion that the person is either actually engaged in crime or predisposed to criminal activity. As noted by the court in *Jacobson*, the FBI in its Abscam sting operation

targeted only individuals who had been reliably identified as predisposed to taking or offering bribes. *See Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice*, S. Rep. No. 682, 97th Cong., 2nd Sess. 13 (1982), cited in *Jacobson*, 893 F.2d at 1001. It will be the rare case indeed where law enforcement conduct crosses this bright line. However, there is too much danger that improper considerations will enter a decision to investigate in the absence of even reasonable suspicion that the targeted individual is engaged in criminal activity. For example, in this case there is the undeniable fact that petitioner's Oriental accent was a significant factor in the initiation of the investigation. *United States v. Yun*, 718 F. Supp. at 372 (19a).

This Court has not spoken to the due process implications of sting operations since 1976. The decision of the Third Circuit in this case is clearly at odds with that of the Ninth Circuit in *United States v. Luttrell* and, prior to its withdrawal pending rehearing, of the Eighth Circuit in *United States v. Jacobson*. This petition for certiorari should be granted to resolve this conflict among the Circuits. *See* Supreme Court Rule 10.

II.

PETITIONER IN THIS MATTER WAS ENTRAPPED AS A MATTER OF LAW SINCE THERE WAS INSUFFICIENT EVIDENCE OF PREDISPOSITION.

The focus of the immediately preceding legal argument was the government's state of knowledge regarding petitioner Yun prior to initiation of its sting operation. It bears repeating that when the investigation was initiated, the government had no information that Yun had ever engaged in criminal activity, was planning to engage in criminal activity or was predisposed to engage in criminal activity. *United States v. Yun, supra*, 718 F. Supp. at 367 (7a).

If a defendant was not predisposed to criminal conduct, it follows as a matter of law that if he engages in criminal conduct as a result of the government's initiation and importunings, he was entrapped as a matter of law. In the absence of circumstances under which a reasonable jury could conclude beyond a reasonable doubt that the defendant was predisposed to criminal conduct, he is entitled to a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 16, 98 S. Ct. 2141, 2149, 57 L. Ed. 2d 1 (1978); *see also, United States v. Jannotti*, 673 F.2d 578, 598 (3d Cir. 1982).

In *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932), this Court provided the classic definition of the circumstances under which entrapment could be found:

> [Entrapment occurs] when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Sorrells, 287 U.S. at 442.

This case presents the classic example of a defendant who was clearly not disposed to the commission of crimes but whose instincts toward honesty were ultimately overcome by an inexorable combination of pressure, inducement, trickery and deceit. As the following discussion will show, the purported evidence of predisposition was so minimal by comparison with the inducements to crime offered by our government that no reasonable jury, even giving the government the benefit of all its inferences, could justifiably have returned the verdict that it did.

The government's campaign to entrap Juwhan Yun occupied a span of six months and commenced, as noted, following Yun's

legitimate efforts to negotiate a sale of munitions to the government of South Korea. At the outset of its investigation, the government dangled a major inducement in front of petitioner's eyes, great monetary reward. During the first meeting between Agent Kennan and Yun, the agent bragged that he was an international businessman of substantial wealth who employed 75 people and who had done $25 million in business the preceding year (App. B. 3.51-52). The agent let slip the fact that he lived in an exclusive New Jersey suburb, Upper Saddle River, and that he was thinking of forming a partnership with Yun and, if things went well, might even sell his business to Yun (App. B. 3.53). It is no surprise that following this meeting, Yun was very excited about having found the needed supplier for the legal 105/106 deal and that he had stumbled into a "great fortune." (App. C. 5.111).

As the months passed, Kennan kept up the pretenses and met regularly with Yun to discuss possible arms deals. No deals were ever completed. On October 31, the government secured a wiretap on petitioner's business phones and also arranged to intercept all fax transmissions to Komex while a pen register recorded all calls made from Komex (App. B. 1.07). Kennan continually pressed Yun to move quickly on any possible illegal deals because Kennan was losing money on the items while they were in the warehouse (App. B. 3.90-91). The government's tactical approach was clear — dangle the 105/106 deal and try to convince Yun to engage in illegal activity in order to make the legitimate transaction occur.

On November 23, 1988 a conversation was intercepted between Yun and Charles Caplan, an international exporter in London, England (App. B. 3.91). Caplan asked Yun to try to find a supplier of Sarin (App. B. 3.92). Yun had no idea what Sarin was, could not spell the word, and made several inquiries as to what the material was. Having intercepted the conversation, the government then decided to see what would happen if Kennan

feigned a Sarin source (App. B. 3.93). It was Kennan who told Yun that the material was nerve gas. When Kennan asked Yun if he was interested in such a deal, Yun's response was, "No, no, no, no." (App. B. 3.93). Thereafter, every time the subject of Sarin was raised, Kennan did so (App. B. 3.80). The agent acknowledged that at every meeting Yun expressed reservations about going forward with the Sarin deal (App. B. 3.57). To facilitate the deal, Kennan offered to obtain a phony export license, to be the shipper and exporter on the Sarin deal, and to provide a phony end-user certificate (App. C. 4.43).

Things apparently were still not moving along to the government's satisfaction since on December 12, Kennan actually signed a purchase order for the 105/106 ammunition (App. B. 3.77). Believing that he had now made the 105/106 deal, Yun proceeded to post a performance bond of approximately $225,000 with the government of South Korea to guarantee his delivery of the 105/106 (App. D. 7.80; 7.40). By this point, Kennan was overtly linking the shipment of Sarin with that of the 105/106 ammunitions (App. C. 4.47).

Thus, at the end of 1988 the situation was that Yun was continually expressing reservations about the Sarin deal while the government was increasingly linking Yun's following through on the Sarin deal with the legal 105/106 shipment. Yun was thus placed in the position by the government of having either to attempt to consummate the Sarin deal or to forfeit the $225,000 performance bond.

Despite the government-created pressures, Yun continued to stall and equivocate. On January 11, 1989 a meeting occurred between Kennan and Yun at a restaurant. The meeting was tape-recorded and, in the course of the conversation, Kennan directly tied the 105/106 shipment to the Sarin deal or another possible transaction involving TOW missiles (a-58). Yun had finally had

enough and told Kennan that he would not go through with the deal, that he did not want to engage in illegal activity and wished to continue making a living doing honest business (a-63). Despite the government's blandishments, Yun told Kennan during that meeting to "forget" the Sarin deal (a-62). His final words were, "You forget everything? Forget." (a-66).

At trial, Yun testified that after he met with Kennan on January 11, he believed his life was "gone, [and] that he was [financially] ruined." (App. D. 7.30). Accordingly, Yun again called Kennan late on the afternoon of January 11 to ask again that they do a quick shipment of the legal 105/106 ammunition (App. B. 3.98). Yun told Kennan during that conversation that Yun was desperate, that he was losing his performance bond and risked losing all future business with the South Korean government (App. B. 3.85). When Yun showed up for a meeting on January 12, he was arrested. Prior to attending that meeting, he had taken all documents relating to the Sarin proposal, torn them up and thrown them into his wastebasket (App. D. 7.47-48). These documents were recovered, in their torn up condition, by the government following Yun's arrest. During his testimony, Kennan admitted that he believed Petitioner when he said he couldn't manage the Sarin deal and that Kennan was very concerned that six months of investigation had come to nothing (App. B. 3.97-98).

In contrast to this extraordinary example of government inducement to crime, the evidence of predisposition was minimal indeed. The first example of "predisposition" was that between June 1986 and December 1988, Yun had shipped to South Korea spare parts for the 20mm "Vulcan" automatic weapon without an export license. Yun testified that this activity was an innocent mistake in that he did not realize that he was supposed to obtain an export license for the materials since they were in many cases common hardware items, such as nuts and bolts, that had hundreds of applications other than as weapons parts (App. E. 10.60-10.66).

This testimony was buttressed by the fact that the shipment was legal, that an export license could readily have been obtained and that all activities with regard to the Vulcan parts were conducted completely in the open, with accurate disclosure of the principals in a business-like and above-board manner (App. E. 10.60-66).

The second example of predisposition focused on an inquiry Yun's Korean friend K.Y. Joo had made five years earlier concerning supplying TOW missiles to Iran, a proposal Yun had immediately rejected (App. D. 9.166-77). A later inquiry regarding TOW missiles triggered an FBI interview of Yun with regard to 1,000 TOW missiles for the government of South Korea (App. E. 10.15; 10.18; 10.54). The final evidence of predisposition was a deal with the Swedish Government for anti-tank rockets that were supposed to be sold to the government of South Korea through Greece with a designated end-user of Thailand. This ruse was Sweden's way of avoiding its own rule of not selling arms to a country engaged in civil war or, as in the case of South Korea, to a divided country (App. E. 10.31).

The above examples of "predisposition" evidence were all the government was able to glean from its review of ten years of business records maintained by Yun in Komex's offices. In truth, this sorry record reveals an honest businessman, pursuing legitimate business deals who, by the time the government got through with him, had been pressured into committing crimes and, ultimately, was convicted by a jury of conspiracy and jailed. This is government-created crime at its worst. This Court should grant this petition and exercise its authority to set aside this verdict.

CONCLUSION

For the reasons expressed above, a petition for a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit to review this conviction.

Respectfully submitted,

DAVID A. RUHNKE
Counsel of Record
RUHNKE & BARRETT
Attorneys for Petitioner

Dated: September 24, 1990

APPENDIX A — ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED JULY 12, 1990

SUPREME COURT OF THE UNITED STATES

No. A-27

Juwhan Yun,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 24th, 1990.

s/ William J. Brennan
Associate Justice of the Supreme
Court of the United States

Dated this 12th
day of July, 1990

APPENDIX B — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5775

UNITED STATES OF AMERICA

vs.

JUN, JUWHAN

Juwhan Yun, a/k/a J.W. Yun,
Appellant

SUR PETITION FOR REHEARING

BEFORE: HIGGINBOTHAM, *Chief Judge,* SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix B

By the Court,

s/ Walter K. Stapleton
Circuit Judge

Dated: Apr 27 1990

APPENDIX C — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5775

UNITED STATES OF AMERICA

vs.

YUN, JUWHAN

Juwhan Yun, a/k/a J.W. Yun,
Appellant

On Appeal from the United States District Court
For the District of New Jersey (Newark)
(Criminal Action No. 89-00016)
District Judge: Honorable H. Lee Sarokin

Argued March 16, 1988 [sic]

BEFORE: SLOVITER, BECKER, and STAPLETON,
Circuit Judges,

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit:

1. That appellant was entrapped as a matter of law because he presented evidence that Kennan induced him to commit the

crime and there was insufficient evidence as a matter of law to find that he was predisposed to commit the crime;

2. That appellant's right to substantive due process was violated not only because the sting operation against him was undertaken without any reasonable basis for suspecting him of being involved in criminal activity but also because it was undertaken, partly, for racial reasons; and

3. That uncertainty regarding the plain meaning of the word "sophisticated" when applied to Sarin and uncertainty regarding the Sentencing Commission's intent in using the word dictate that the nerve gas Sarin should be regarded as unsophisticated and appellant's sentence reduced accordingly,

IT IS ORDERED AND ADJUDGED that the judgment of the district court dated September 18, 1989, be and is hereby affirmed.

By the Court,

s/ Walter K. Stapleton
Circuit Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: MAR 29 1990

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, DATED JULY 18, 1989

UNITED STATES of America

v.

Juwhan YUN, a/k/a J.W. Yun and Charles Caplan.

United States District Court,
D. New Jersey.

July 18, 1989

Mark S. Olinsky, Asst. U.S. Atty., Newark, N.J., for U.S.

Stephen N. Dratch, Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin, P.A., Roseland, N.J., for defendant Yun.

OPINION

SAROKIN, District Judge.

INTRODUCTION

It cannot be refuted that undercover operations are a necessary and accepted means for discovering and prosecuting criminal activities. In addition, it must be recognized that those who participate in such activities on behalf of the government place themselves at great personal risk. However, there is a concomitant peril to those who are the subject of such undercover operations, if the zeal of the agents to discover criminal activity causes them to create it.

In this case, the defendant made an inquiry about a legal

transaction for which he had a license from the federal government. In making the inquiry, he disclosed his name, address, and telephone number. Those circumstances alone launched the undercover investigation. There is no evidence that the defendant would have or could have pursued the purchase of the illegal item for which he was eventually charged, but for the intervention of the government agent. Indeed, the jury verdict reflects a conviction of the defendant primarily for what he said, rather than for what he did.

Although the actions of the agent clearly raised the issue of entrapment, the jury rejected that defense and the court will not interfere with the jury's finding in this regard. However, the court fears that the absence of any established minimum standard for the commencement of an undercover operation places innocent persons in jeopardy and dilutes every citizen's right of privacy.

Should a government agent acting in an undercover capacity be permitted to attempt to engage someone in criminal activity when the government possesses no information that such person ever was, is now, or intends to be engaged in *any* criminal activity? Should our government be permitted, through subterfuge and deceit, to seek out a law-abiding citizen for the sole purpose of testing whether or not such person will engage in illegal conduct?

Were it not for the actions of the agent, it is unlikely that the defendant would have committed the crime for which he was convicted. However, the jury found that the defendant was predisposed, and thus not entrapped. No authority now exists which would permit this court to find that the mere initiation of the investigation violated defendant's due process rights. Moreover, the conduct of the agent, although offensive and objectionable in many respects throughout the course of the

investigation, was not so outrageous as to permit or require this court to set aside the jury's verdict of guilt. Therefore, the defendant's motions for a judgment of acquittal and, in the alternative, for a new trial, shall be denied for the reasons hereinafter set forth.

BACKGROUND

On January 20, 1989 defendant Yun was indicted on two charges. Count One charged that Yun conspired to export from the United States the defense article Sarin, or nerve gas, without obtaining a license or other written approval from the government in violation of 22 U.S.C. Sections 2778(b)(2) and (c), 22 C.F.R. Section 127.1, and 18 U.S.C. Section 371. Count Two charged that Yun attempted to export Sarin without obtaining a license or other written approval.

After a three-week trial by jury, Yun was acquitted of the attempt charge but was convicted of the conspiracy charge. Yun now moves for an order entering a judgment of acquittal on the conspiracy count pursuant to Fed.R.Crim.P. 29 or, in the alternative, for a new trial pursuant to Fed.R.Crim.P. 33.

DISCUSSION

Legal Standard.

On a post verdict motion for acquittal, this court

> must view the evidence in the light most favorable to the verdict, and must presume that the jury has properly carried out its functions of evaluating credibility of witnesses, finding the facts, and

> drawing justifiable inferences. A verdict will be overruled only if no reasonable juror could accept the eveidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt.

United States v. Coleman, 811 F.2d 804, 807 (3d Cir.1987) (citations omitted).

A motion for a new trial may be granted if necessary to prevent injustice or to correct a verdict that was against the weight of the evidence. *American Bearing Co., Inc. v. Litton Industries*, 729 F.2d 943, 946 (3d Cir.1984), *cert. denied*, 469 U.S. 854, 105 S.Ct. 178, 83 L.Ed.2d 112 (1984).

Yun's Due Process Argument.

Yun renews his contention that the government's undercover investigation was so outrageous that it constituted a violation of his due process rights and warrants the entry of a judgment of acquittal by this court.[1] Yun relies heavily upon the decision of the Third Circuit Court of Appeals in *United States v. Twigg*, 588 F.2d 373 (3d Cir.1978).

In *Twigg*, a jury convicted defendants Neville and Twigg on charges stemming from illegal manufacture of a controlled substance. The Drug Enforcement Administration (DEA) obtained the cooperation of a convicted felon named Kubica in connection with a plea agreement on a drug charge. Kubica contacted Neville

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1. Yun previously moved for dismissal of the indictment on due process grounds at the close of the government's case and at the close of all the evidence. The court denied both motions.

and proposed setting up a methamphetamine laboratory. Neville subsequently invited Twigg to join in the operation. Kubica, the government agent, was completely in charge of the entire laboratory, and furnished all of the laboratory expertise. Neither defendant had the know-how with which to actually manufacture the drug. Assistance by Neville and Twigg was minor and at the specific direction of Kubica. The government supplied much of the necessary chemicals and equipment, as well as an isolated farmhouse well-suited for the location of an illegally operated laboratory, all at no cost to the defendants. *Id.* at 375-76, 380-81.

The court concluded as follows:

> Using Kubica, and actively participating with him, the DEA agents deceptively implanted the criminal design in Neville's mind. They set him up, encouraged him, provided the essential supplies and technical expertise, and when he and Kubica encountered difficulties in consummating the crime, they assisted in finding solutions. The egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs. Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred.

Id. at 381. The court also reversed the conviction of Twigg, who ran errands for the criminal enterprise, because he contributed nothing in terms of expertise, money, supplies, or ideas and would

not even have shared in the proceeds of the sale of the drug. *Id.* at 382.

Yun points to one other decision of this jurisdiction in support of his due process defense.[2] In *United States v. Gardner*, 658 F. Supp. 1573 (W.D.Pa.1987), the district court granted a defendant's motion to dismiss an indictment on drug charges. The court found that an undercover government agent "undeniably badgered, cajoled, induced, inveigled and utilized his position as a postal employee to acquire Gardner's friendship and utilized promises of assisting him in repairing his car to induce Gardner's cooperation in obtaining [drugs]." *Id.* at 1576. The court also concluded, as a matter of law, that the defendant had no previous predisposition of any kind to violate the law. *Id.* at 1577. After a hearing on defendant's motion, at which the government elected not to present any evidence, the court concluded that the conduct of the law enforcement officials was so outrageous that due process of law principles would bar the government from securing a conviction. *Id.*

Yun argues that the facts adduced at trial demonstrate that the government agent violated his due process rights. Yun contends that the government lacked a sufficient basis to initiate any investigation; that he knew nothing about Sarin prior to the government's investigation; and that the government agent consistently misrepresented facts about his identity and intention to perform a legitimate deal which Yun had guaranteed with a

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2. Yun also points to a decision of a district court in the Ninth Circuit in *United States v. Batres-Santolino*, 521 F.Supp. 744 (N.D.Cal.1981). In *Batres-Santolino*, the court dismissed an indictment on drug charges against "obvious novices," because it was "inconceivable that they could have entered the secretive world of international drug smuggling on their own." *Id.* at 751.

performance bond. In Yun's view, the scheme to obtain a phony export license for Sarin by bribing officials originated with the government agent rather than Yun. Yun catalogs a litany of inducements, ranging from the government agent's promises of future partnerships and profits to his dismissing as unfounded Yun's worries about the legal consequences of their dealings. In essence, Yun argues that the government's promise to deliver a legal commodity induced his reliance (his posting a performance bond), and that the government sought first to link the legal and illegal deals, and then to insist that the illegal deals be consummated prior to the shipment of the legal commodity. He insists that he was an "obvious novice," and that it is inconceivable that he would have engaged in such illegal arms dealings without the knowledge and assistance of the government. Yun submits that the conduct of the government agents violated his due process rights, necessitating a judgment of acquittal.[3]

The government opposes Yun's motion for acquittal, arguing that the case law simply does not afford any ground for overturning the jury's verdict in this matter. The government points out that *Twigg* stands virtually alone as Third Circuit precedent for the due process defense. The government, in turn, relies upon the *en banc* decision of the Third Circuit in *United States v. Jannotti,* 673 F.2d 578 (3d Cir.1982), *cert. denied,* 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982), as well as the consistent line of decisions limiting the due process defense.

Prior to discussing *Jannotti* and its progeny, the court notes that an examination of the Supreme Court's pronouncements in

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3. Yun also moves for an evidentiary hearing on the issue of the government's conduct. Because the court is satisfied that the relevant facts were brought out at trial, the motion is denied.

this area reveals that the scope of *Twigg* is indeed limited. In *United States v. Russell,* 411 U.S. 423, 431-33, 93 S.Ct. 1637, 1642-44, 36 L.Ed.2d 366 (1973), the Supreme Court traced the history of the entrapment doctrine and concluded that the key inquiry was properly focused on the defendant's state of mind, and not the government's conduct. The Court did state, however, that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32, 93 S.Ct at 1643. Because the defendant in *Russell* was an "active participant in an illegal drug manufacturing enterprise," *id.* at 436, 93 S.Ct. at 1645, the Court held that the due process defense was not a bar to his conviction.

In *Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), the defendant attempted to set aside his conviction on drug charges, relying upon the due process defense recognized in *Russell.* Although conceding that the government "obviously played a more significant role in enabling petitioner to sell contraband in this case than it did in *Russell,*" a plurality of the Court stated that the remedy of a criminal defendant with respect to the acts of governments agents, with whom the defendant acts in concert, "lies solely in the defense of entrapment." *Id.* at 489-90, 96 S.Ct at 1650. Because a jury had rejected the defendant's entrapment defense, implicitly finding predisposition, the due process defense was unavailable. *Id.*

In *Jannotti,* the Third Circuit interpreted the *Hampton* plurality opinion a hinting that the due process defense might not be available at all. 673 F.2d at 607. At the same time, the appellate court noted that a majority of the *Hampton* Court, composed of the three dissenting Justices and the two concurring

Justices, rejected the view that the entrapment defense was the only doctrine available to a defendant alleging governmental misconduct. However, the court noted that the due process defense was extremely narrow in cases in which entrapment is at issue, highlighting Justice Powell's observation that "the cases, if any, in which proof of predisposition is not dispositive will be rare," and that "[p]olice overinvolvement in crime would have to reach a demonstratable level of outrageousness before it could bar conviction." 425 U.S. at 495, n. 7, 96 S.Ct. at 1653, n. 7 (concurring opinion).

Jannotti, which arose out of the ABSCAM investigation, demonstrates that the due process defense is simply not available except in the most egregious instances of governmental misconduct. Jannotti was convicted by a jury of conspiring to obstruct interstate commerce. The district court entered an order setting aside the verdict in its entirety based, in part, on a finding that the government's overreaching amounted to a violation of due process of law. The Third Circuit reversed the district court's order, concluding that the district court had "usurped the function of the jury to decide contested issues of fact," *id.* at 581, and directed the reinstatement of the jury's verdict.

In so holding, the Third Circuit instructed that the entrapment defense is separate and distinct from the due process defense. *Id.* at 606. The appellate court stated that a successful due process defense must be predicated on "intolerable government conduct which goes beyond that necessary to sustain an entrapment defense." *Id.* at 607. The court continued:

> We must necessarily exercise scrupulous restraint before we denounce law enforcemet conduct as constitutionally unacceptable; the ramifications are wider and more permanent than when only a

> statutory defense [of entrapment] is implicated.

Id.

Applied to the facts in *Jannotti,* the Third Circuit determined that the government's inducements (cash bribes) were not so "exceedingly generous" as to negate the evidence of predisposition as a matter of law. *Id.* at 608, Therefore, it was error for the district court to focus on the nature of the government's inducements in finding a due process violation, because the extent of such inducement "necessarily was considered by the factfinder in its rejection of the entrapment defense." *Id.* The court held that where a jury rejects the entrapment defense, a successful due process defense must be predicated on other grounds. *Id.*

The *Jannotti* court factually distinguished *Twigg* as follows:

> . . . in *Twigg,* it was the DEA agents who "set up" the defendant, "encouraged him" and "provided the essential supplies and technical expertise" . . . . In contrast, in this case, the F.B.I. provided neither material nor technical assistance to the defendants; it merely created the fiction that it sought to buy the commodity—influence—that the defendants proclaimed they already possessed.

Id. A plurality of the Third Circuit would have overruled *Twigg* on the basis of the Supreme Court's decision in *Hampton. Id.* at 610, n. 17. Although *Twigg* remains viable, it is certainly not "the leading case in his jurisdiction . . . on the issue of outrageous conduct by the government," as characterized by Yun. (Yun Brief, at 10).

In *United States v. Beverly,* 723 F.2d 11 (3d Cir.1983) (per

curiam), the Third Circuit rejected the due process defense in a case in which government agents promised $3,000 to two financially distressed persons to burn a building, provided gasoline and disguises, and drove the pair in a government car to a building owned by the government, where they were arrested. *Id.* at 12. The court expressed "grave doubts about the propriety of such tactics," *id.* at 13, but concluded that the police conduct was not sufficiently outrageous to compel acquittal.

Notably, the *Beverly* court observed that the case relied upon by the *Twigg* majority, *United States v. West,* 511 F.2d 1083 (3d Cir.1975), was limited by *Hampton* and *Jannotti.* The court also cited *Russell* for the proposition that "the Supreme Court had admonished us that the federal judiciary should not exercise 'a Chancellor's foot' veto over law enforcement practices of which it [does] not approve." *Id.* at 12-13 (citation omitted).

In *United States v. Gambino,* 788 F.2d 938 (3d Cir.1986), *cert. denied,* 479 U.S. 825, 107 S.Ct. 98, 93 L.Ed.2d 49 (1986), defendants appealed their convictions for, *inter alia,* conspiring to distribute heroin. At trial defendants presented evidence that the governement agent had introduced the topic of herein sales during discussions about dealing cocaine; that defendants expressed hesitancy to arrange a heroin sale; and that defendants demonstrated a lack of knowledge about the heroin business. The jury rejected the defense of entrapment. *Id.* at 943. On appeal, one defendant argued that even if the evidence supported a finding of predisposition, due process principles as recognized by *Twigg* provided ground for acquittal. The Third Circuit stated that "[d]espite the holding in *Twigg,* this court and other appellate courts have since exercised extreme caution in finding due process violations in undercover settings." *Id.* at 945, n. 6. The appellate court rejected the due process defense, finding no egregious

government misconduct.

In *United States v. Ward,* 793 F.2d 551 (3d Cir.1986), defendants appealed their convictions for conspiracy to possess with intent to distribute a large quantity of marijuana. Defendants argued that the government's misconduct violated their due process rights. The Third Circuit examined the history of the "outrageous conduct doctrine," and concluded that *Twigg* was the only post-*Hampton* appellate court decision to reverse a conviction because of law enforcement conduct characterized as "outrageous." *Id.* at 553-554. The *Ward* court pointed to the *Beverly* decision as an example of the "extreme caution" exercised by the court in finding due process violations in undercover settings. *Id.* at 554.

The *Ward* court found no due process violation, noting that both defendants brought significant experience and expertise to their roles and made active efforts to promote the distribution scheme. The court distinguished *Twigg* as follows: "As the DEA's scheme entailed considerable participation on the part of defendants, it is not comparable to the completely government-initiated and government-operated plan found in *Twigg.*" *Id.* at 555.

In *United States v. Engler,* 806 F.2d 425, 429 (3d Cir.1986), *cert. denied,* 481 U.S. 1019, 107 S.Ct. 1900, 95 L.Ed.2d 506 (1987), the Third Circuit, relying upon the *Hampton* and *Jannotti* decisions, stated that allegations of government misconduct which are merely duplicative of a defendant's entrapment defense contentions "may not provide an independant basis for a defense or acquittal."

In *United States v. Martino,* 825 F.2d 754 (3d Cir.1987), as part of an undercover investigation, a grand jury subpoena was

issued to an undercover agent in a pseudonym under which the agent was working. The district court found that the sham subpoena abused the grand jury process and dismissed an indictment arising from the investigation. Although the district court had explicitly invoked its supervisory power to protect the integrity of the judicial process, the Third Circuit treated the appeal as involving a question of due process. The Third Circuit reversed the district court's order and reinstated the indictment. In support of its conclusion that the government conduct did not constitute a violation of the defendant's due process rights, the court cited a Seventh Circuit decision stating that

> [i]n the pursuit of crime the Government is not confined to behavior suitable for the drawing room. It may use decoys and provide the essential tools of the offense. The creation of opportunities for crime is nasty but necessary business.

Id. at 763, citing *United States v. Murphy,* 768 F.2d 1518, 1529 (7th Cir.1985), *cert. denied,* 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

Most recently, in *United States v. Driscoll,* 852 F.2d 84 (3d Cir.1988), the Third Circuit rejected the appeal on due process grounds of a defendant convicted of receiving child pornography through the mail. The defendant argued that absent the government committing the federal crime of sending such material through the mail, he could not possibly be guilty of the crime. The appellate court rejected this contention, finding that the government's conduct approximated that which survived constitutional attack in *Jannotti.*

The court's review of the case law reveals that Yun's

contentions do not support a viable due process claim. The court first reluctantly concludes that the initiation of the investigation of Yun did not violate his due process rights. The government's investigation in this case was prompted by a telephone call by an officer of a company which received Yun's inquiry about 105/106 mm. ammunition. The officer had previously been employed at the Customs Service for ten years. The court is troubled by reason of the fact that one of the bases for the government informant's suspicions about Yun's initial inquiry was that he spoke with an "Oriental" voice. (T1.74). However, the informant also stated that it was unusual for his company to receive a domestic inquiry seeking 105/106 mm. ammunition on behalf of the government of the Republic of Korea. (T1.79). The informant further explained that "[t]his is a very sensitive area of commercial industry, that our company is concerned about who our customers are." (T1.79) Based on this testimony, the court cannot find that the investigation was launched for an improper reason.

Moreover, the case law makes clear that no showing is required before the government may commence an undercover investigation. For example, the *Jannotti* decision explicitly forecloses Yun's argument based upon the apparent lack of basis for the government's initial inquiry, stating that at least in the context of entrapment, "it is *inconsequential* whether law enforcement officials did or did not act on *well-grounded suspicion* that the defendant was engaging in wrongdoing, or whether they had *probable cause* for approaching the defendant." *Id.* at 609 (emphasis in original, citation omitted). *See also United States v. Driscoll, supra* (contention that government agents lacked reasonable basis to target defendant is of no legal significance); *Harrison v. Baylor,* 548 F.Supp. 1037, 1040 (D.Del.1982) (Stapleton, J.) (government agents may properly propose a

criminal transaction to an individual without having a reasonable basis to suspect that he or she is engaging in wrongdoing).

In addition, the court concludes that the government's conduct after the investigation began did not violate Yun's due process rights. Yun claims that the scheme to obtain a phony export license through bribery originated with the government agent. *Gambino* rejected a similar claim that the government initiated the scheme for which the defendant was and convicted when, as in this case, prior discussions had referred to potential violations of the law. Yun's claim that he knew nothing of Sarin and expressed hesitation throughout is also unpersuasive, inasmuch as similar protestations were dismissed in *Gambino*. Yun argues that for the government's involvement, he never would have committed the crime for which he was convicted. The defendant in *Driscoll* made the same argument, to no avail.

The due process defense, articulated in *Twigg*, now appears to be limited to a plan that is *completely* initiated and operated by the government. If the government was insufficiently involved in the arson plan in *Beverly* to warrant acquittal on due process grounds, then the government's in this case cannot constitute a constitutional violation. Moreover, the jury could have found that Yun played an active role in the scheme. Such a finding would be supported by evidence offered by the government, including the fact that Yun even brought documents relating to Sarin on a trip to England where he met with others interested in such a deal. Yun also calculated that his profits from the Sarin transaction would be substantial. Under the court's analysis in *Ward*, this level of involvement is sufficient to foreclose a due process defense.

In sum, the government offered sufficient evidence such that

a jury could have found that Yun was an active participant in a plan to export Sarin without a legitimate license. In reviewing the evidence, this court cannot conclude that the plan was completely initiated and operated by the government. Accordingly, Yun's motion for an order entering a judgment of acquittal is denied.

Entrapment as a Matter of Law

Yun argues that the court should reverse the conviction, contending that the evidence demonstrates that he was entrapped as a matter of law on January 12, 1989. The basis for this contention is Yun's claim that "the evidence clearly demonstrates that on January 11, 1989, Mr. Yun withdrew from the conspiracy." (Yun Brief, at 40). Based on the proposition that the January 11 meeting proves his withdrawal, Yun contends that no evidence was introduced as to his predisposition between the meeting and the day of his arrest.

The Third Circuit has stated that entrapment is established as a matter of law "[w]here the evidence is *undisputed* that the defendant had no predisposition to commit the crimes with which he is charged, and was induced to do so only by the trickery, persuasion or fraud of the government". *Gambino, supra,* at 944 (emphasis added). In this case, the evidence did not clearly demonstrate that Yun withdrew from the conspiracy on January 11, 1989. Rather, what transpired during the January 11 meeting and "blow-up," as well as Yun's prior and subsequent actions, was hotly disputed by the parties and was for the jury to evaluate. Specifically, it was for the jury to decide whether Yun withdrew from the conspiracy and it was for the jury to decide whether Yun had produced sufficient evidence of non-predisposition. *See Jannotti,* 673 F.2d at 606 ("[t]he ultimate factual decisions in

an entrapment case must be left to the jury"). Viewing the evidence in a light most favorable to the government, the court finds no basis to disturb the jury's determination that Yun was not entrapped and did not withdraw from the conspiracy.

Admission of F.R.E. 404(b) evidence.

Over Yun's objections, the court ruled that tapes of conversations between Yun and the government agent concerning other arms transactions were relevant, and that their probative value outweighed any unfair prejudice to the defendant. Yun contends that the court erred in admitting the 404(b) evidence because it was only minimally connected with the crime charged and was designed to inflame and prejudice the jury. Yun argues that the admission of prior conversations about arms deals makes it likely that the jury convicted him but not for the offense charged but for the extrinsic offenses, exactly what F.R.E. 403 was designed to avoid.

The government contends that the prior deals were relevant because they established a pattern by which the Sarin deal was to be carried out. Specifically, in the earlier conversations, Yun and the agent developed a code which substituted innocuous words for illegal items and discussed ways to circumvent export certification laws. Without the evidence of the prior discussions, the government contends, the jury could not have understood the later references to obtaining a license for Sarin at a price of $50,000 or that Yun's use of the word "saccharine" in place of "Sarin" followed a pattern of such code language. Moreover, the government argues that the earlier conversations were extremely relevant to the issue of predisposition, once entrapment became an issue.

Appendix D

Having reviewed the parties arguments, the court again concludes that the prior conversations of arms transactions were relevant under F.R.E. 404(b) and that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice under F.R.E. 403. Moreover, the conversations were relevant and admissible with respect to the issue of Yun's predisposition.

Admission of prior shipments of Vulcan spare parts

During the government's rebuttal case, it offered evidence that from 1986 until 1988, Yun exported Vulcan automatic weapon spare parts valued at approximately $254,000 without an export license in violation of the Arms Export Control Act. The court admitted the evidence as relevant to Yun's predisposition.

Yun argues that invoices and other documents demonstrate that these shipments were not made surreptitiously. To the contrary, Yun submits that any violations of the Export Act were unintentional. Yun argues that the extrinsic act was a strict liability offense, requiring no element of criminal intent, which may not be admitted to prove that Yun had the specific intent to export Sarin without an export license. Moreover, Yun argues that the extrinsic evidence was of dubious relevance because the evidence showed that the spare parts could be used for other purposes.

The government agrees with the legal proposition that the charged offense and the extrinsic act require the same level of criminal intent in order for the extrinsic act to be admissible as proof of the defendant's intent to commit the charged offense. However, the government states that, as a matter of law, the knowing and willful export of the Vulcan spare parts without a license violated 22 U.S.C. Section 2778, involving the same

statute and criminal intent for which Yun was convicted in this case. Because the extrinsic act and the charged offense involve the same level of criminal intent, the government argues, the evidence of prior shipments of Vulcan spare parts was admissible.

Yun concedes that the Vulcan shipments violated the Arms Export Control Act yet insists that " it is evident that the 'Vulcan' shipments were at best innocent infractions." (Yun Brief, at 55). However, whether the shipment of such items without a export license was knowing and willful was a matter for the jury to decide, and it was for the jury to consider Yun's explanation. Similarly, it was for the jury to weigh evidence that such spare parts could have been used for other purposes. Simply put, it was for the jury to decide whether such shipments were "innocent infractions" or whether they were evidence of Yun's predisposition to commit the crime for which he was convicted. Accordingly, the court finds no error in the admission of evidence of Yun's shipments of Vulcan spare parts without an export license.

Government's Reference to Separate Grand Jury Investigation

Yun argues that the court committed reversible error by permitting the government to elicit testimony that the government had obtained, as part of a *separate* grand jury investigation, a copy of the performance bond that Yun had posted on the legitimate 105/106 mm. deal. Yun contends that this error was compounded by the government's reference to the second investigation in summation.

At trial, Agent Kennan testified that the only bond Yun had shown him was "bogus." According to Yun, this testimony was designed to create the impression that Yun had not posted a valid performance bond with respect to the legitimate 105/106 transaction. To counter this notion, the defense called Special

Appendix D

Agent Ventura to establish that the Customs Service had the performance bond in its possession *before* Agent Kennan testified. The defense proceeded in this matter even though the government offered to stipulate to the admission of the actual performance bond without testimony.

Prior to Ventura's testimony, the government informed the defense that the performance bond had been obtained as part of a grand jury investigation *after* Yun had been arrested, and represented that Agent Kennan had not seen a copy of the performance bond prior to taking the stand. (T6.4-6.7). On direct examination conducted by the defense, Agent Ventura testified that he received the valid performance bond as a result of a grand jury subpoena. When asked to repeat how the bond had been obtained, Ventura testified that "Two Grand Jury subpoenas had been issued prior to the trial subpoena." (T6.14). Ventura also testified that he had discussed the contents of the documents obtained with the government's trial attorney and "probably" Agent Kennan. (T6.16).

Yun contends that the government improperly elicited on cross-examination that Yun had been the target of a second grandjury investigation. Agent Ventura testified on cross-examination as follows:

> Q. Agent Ventura, the document that was just shown to you, 206 [the valid performance bond], that was obtained in connection with what investigation? Was it involved in this case?
>
> A. Yes.
>
> Q. Was it specifically part of this case that is on trial here?

Appendix D

* * *

[The court sustains Mr. Dratch's objection on the grounds that the question has been asked and answered].

Q. Agent Ventura, was your investigation—isn't it correct, your investigation over the past several months included matters beyond what is exactly on trial here today relating to the Sarin matter?

MR. DRATCH: Objection.

THE COURT: Overruled.

A. Correct.

Q. Isn't it true that the Grand Jury subpoena from which you obtained the document Mr. Dratch showed you was part of a different investigation?

A. Correct.

MR. DRATCH: Objection.

THE COURT: Overruled

Q. So the documents that he showed you were not obtained for purposes of this case that is on trial here today?

A. Correct.

Q. And you did not obtain them until some months after the arrest of Mr. Yun on January 12, is that correct?

A. Yes, sir.

Q. So the Customs Service did not have a copy of the performance bond that Mr. Dratch just introduced into evidence until months after January 12th. Is that correct?

A. Correct.

Q. And do you have an estimate of approximately how many months it was before the Customs Service got a copy of the performance bond that is now in evidence?

A. Roughly I would say two to three months.

* * *

(T. 6.18-19).

Yun also argues that the government improperly referred to Ventura's testimony about the second grand jury investigation during his summation. Yun points to the following portion of the government's summation:

> Agent Ventura testified that as part of a different investigation, he obtained bank records, reems of them, he said a foot high of documents, that he

was not specifically looking for the performance bond and got those like a month or so ago . . .

* * *

We are not saying it was a bogus bond, the point is what did Kennan know. The only thing he had seen as of January 11th, was a piece of paper that looked like a cut and paste job. You know what it looks like. You saw it. Nobody had given him a performance bond, Yun admitted that.

Nobody can confirm to him orally there was a performance bond posted. How can somebody argue that he was putting a pressure on a performance bond, he didn't know existed?

(T. 10-180-181)

In response, the government argues that the cross-examination of Agent Ventura was necessary to show the jury that the valid performance had been obtained in a separate investigation and had not been suppressed. The government also contends that its reference to the second investigation was necessary to rebut the defense contention that Agent Kennan had tried to mislead the jury by testifying that the only bond he had seen was a bogus one. Moreover, the governnment argues that any references to the second investigation were invited by the defense, which called Ventura to the stand and elicited testimony about how the government obtained the valid bond, after the government had represented that the bond had been obtained after Yun's arrest pursuant to a second grand jury investigation. Finally, the government points out that the defense refused the court's offer

of a charge "that any reference to any other grand jury investigations should be disregarded." (T11.35).

The court permitted the defense to elicit from Agent Ventura testimony as to whether Agent Kennan knew that Yun had posted a valid performance bond, because such testimony would be relevant to Kennan's credibility. (T. 6.7-6.8) After Ventura testified that the government had obtained a copy of the valid bond, it was proper for the government to attempt to demonstrate that Kennan himself had not seen the bond, a point that Yun concedes. (Yun Brief, at 63). The crux of Yun's argument appears to be that the government could have elicited such testimony without bringing out the fact that Yun's records had been obtained pursuant to a *second* investigation.

However, the defense itself elicited mention of this second investigation in its direct examination of Agent Ventura, even asking the witness to repeat his reference to a second grand jury investigation. At that point, it was proper for the government to clarify on cross-examination the circumstances under which the bond was obtained. Similarly, it was not improper for the government to refer to the second investigation during its rebuttal summation, since the defense in its summation had attacked Kennan's credibility on this very point. Finally, the defense declined the court's invitation to charge the jury to disregard any reference to other grand jury investigations. Therefore, Yun is not entitled to a new trial on this ground.

Jury Charge on Withdrawal

The jury instructions on whether Yun withdrew from the conspiracy included the following provision:

Appendix D

> The United States can satisfy this burden [of proving beyond a reasonable doubt that the defendant was a member of the conspiracy and did not withdraw from it] either by impeaching the defendant's proof of withdrawal or by providing evidence of some conduct in furtherance of the conspiracy as charged in the indictment, not something else, subsequent to the alleged act of withdrawal.

(T. 11.63)

The defense asked the court to add the following sentence: "an act committed by the defendant subsequent to this withdrawal, which is unrelated to the furtherance of the conspiracy, does not satisfy the Government's burden." (T. 11.31)

Yun argues that this language would have been "more specific and instructive" (Yun Brief, at 65) and that its exclusion warrants a new trial. Yun contends that the jury should have been instructed not to consider his conversations with the agent after the January 11 blow-up in deciding whether he withdrew from the Sarin transaction. Yun implicitly assumes that it is beyond dispute that those conversations did not deal with the Sarin transaction.

The court is satisfied that the withdrawal charge in a correct statement of the law. *See United States v. Steele,* 685 F.2d 793, 804 (3d Cir. 1982), *cert. denied,* 459 U.S. 908, 103 S.Ct. 213, 74 L.Ed.2d 170 (1982) ("When a defendant has produced sufficient evidence to make a prima facie case of withdrawal . . . [the government] must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy

subsequent to the act of withdrawal.") Moreover, the court added the words "not something else," which appropriately addressed the concerns raised by defense counsel. Therefore, Yun is not entitled to a new trial on this ground.

Government's Argument Based on Yun's Destruction of Documents

It was not disputed at trial that Yun ripped up documents relating to the Sarin transaction and that those documents were recovered by the government after his arrest. Yun argued that his actions demonstrated his intention to withdraw from the agreement. In summation, the government disputed Yun's explanation, arguing that his actions reflected his intention to hide incriminating evidence. Yun objected to the government's argument on the grounds that the evidence did not support an inference that he was attempting to destroy evidence. Yun now renews this argument, and cites several cases which require a showing of bad faith before permitting an adverse inference from the destruction of records. Yun contends that the government's argument was baseless and prejudicial, necessitating a new trial.

The government first argues that the "adverse inference" cases cited by Yun involved the destruction of evidence, whereas in this case the documents were recovered and reconstructed. Thus, there was no issue in this case as to the content of such documents. The government contends that its argument was a reasonable interpretation of Yun's actions.

The court agrees with the position taken by the government. The court finds no basis to disturb its earlier ruling that the significance of Yun's destruction of documents relating to the Sarin deal was a fact question for the jury to resolve. (T11. 34)

Because the court concludes that the government's summation on this point was not unfairly prejudicial, Yun's motion for a new trial is denied on this point.

Request for Court Review of Grand Jury Transcripts.

Yun argues that the government acted improperly in failing to provide the testimony of Agent Kennan to the grand jury, and that the court should determine whether the grand jury was apprised of the January 11 blow-up. Yun suggests that an inquiry by the court would reveal an intentional effort to conceal exculpatory evidence from the grand jury in violation of his due process rights.

The government cites a myriad of cases holding that the prosecutor has no duty to present exculpatory evidence to a grand jury. Even if such a duty existed, the government contends that exclusion of the January 11 meeting would not have rendered return of the indictment "fundamentally unfair" because it was not clearly exculpatory evidence that would likely have convicted the grand jury not to indict. The government finds support for this conclusion in the verdict of the jury, which had before it Kennan's testimony and the circumstances of the January 11 meeting. Finally, the government argues that Yun has not made a sufficient showing to justify disclosure of grand jury materials.

Although the Third Circuit has not ruled on this issue, the majority view expressed by the courts is that a prosecutor has no duty to present any exculpatory evidence to a grand jury. *See United States v. Ismaili*, 828 F.2d 153, 165 n. 13 (3d Cir.1987), *cert. denied*, ____U.S. ____, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988) (and cases cited therein). At the same time, the Third Circuit has recognized a line of authority that imposes upon a prosecutor

a duty to present "exculpatory evidence of which he is aware." *Id.* This court need not decide whether to apply the majority rule, since the jury in this matter was presented with Kennan's testimony as well as the January 11 meeting. The jury's verdict demonstrates that such evidence was not exculpatory.

In light of the jury's verdict, disclosure of the grand jury proceedings would be futile. Yun's motion to dismiss the indictment is therefore denied.

CONCLUSION

For the foregoing reasons, defendant Yun's motions for an order entering a judgment of acquittal and for a new trial are denied.

APPENDIX E — JUDGMENT AND SENTENCE OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY FILED SEPTEMBER 20, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number: 89-16

(Name of Defendant):
UNITED STATES OF AMERICA

V.

JUWHAN YUN

Defendant's Attorney:
Steven Dratch, Esq.

THE DEFENDANT:

* * *

☒ was found guilty on count(s) one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 18:371

Nature of Offense: Conspiracy to unlawfully export a defense article, Sarin

Count Number(s): one

Appendix E

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) two, and is discharged as to such count(s).

* * *

☒ It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 526-27-8446

Defendant's mailing address: MCC, N.Y.

Defendant's residence address: 24 Jefferson Ave.
Short Hills, N.J.

Date of Imposition of Sentence: 9/18/89

Signature of Judicial Officer: s/- H. Lee Sarokin

Name & Title of Judicial Officer: Hon. H. Lee Sarokin, Circuit Judge

Date: 9/18/89

Appendix E

Judgment—Page 2 of 4

Defendant: JUWHAN YUN
Case Number: 89-16

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty (30) months with credit for time served.

* * *

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

Judgment—Page 3 of 4

Defendant: JUWHAN YUN
Case Number: 89-16

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

* * *

Judgment—Page 4 of 4

Defendant: JUWHAN YUN
Case Number: 89-16

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release

pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as

Appendix E

prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-535

In the Supreme Court of the United States

OCTOBER TERM, 1990

JUWHAN YUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

GEOFFREY R. BRIGHAM
Attorney

Department of Justice
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QUESTIONS PRESENTED

1. Whether the government's undercover investigation of petitioner's involvement in illegal munitions-export plans violated the Due Process Clause.

2. Whether the evidence established the defense of entrapment as a matter of law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Hampton v. *United States*, 425 U.S. 484 (1976)	7, 9
United States v. *Driscoll*, 852 F.2d 84 (3d Cir. 1988)	9
United States v. *Jacobson*, 893 F.2d 999 (8th Cir. 1990)	9
United States v. *Jacobson*, 916 F.2d 467 (8th Cir. 1990)	9
United States v. *Jannotti*, 673 F.2d 578 (3d Cir. 1981), cert. denied, 457 U.S. 1106 (1982)	9
United States v. *Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985)	9
United States v. *Luttrell*, 889 F.2d 806 (9th Cir. 1989)	9
United States v. *Luttrell*, 906 F.2d 1384 (9th Cir. 1990)	9-10
United States v. *Miller*, 891 F.2d 1265 (7th Cir. 1989)	9
United States v. *Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980)	9
United States v. *Russell*, 411 U.S. 423 (1973)	7

Constitution, statutes and regulations:

U.S. Const. Amend. XIV (Due Process Clause)	6, 8
18 U.S.C. 371	2
22 U.S.C. 2778(b)(2)	2
22 C.F.R. 127.1	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-535

JUWHAN YUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-5a) is unreported. The opinion of the district court (Pet. App. 6a-33a) is reported at 718 F. Supp. 366.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1990, and a petition for rehearing was denied on April 27, 1990. Pet. App. 2a-3a. On July 12, 1990, Justice Brennan extended the time within which to file a petition for a writ of certiorari to September 24, 1990, and the petition was filed on

that date. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to export nerve gas (Sarin) without a license, in violation of 18 U.S.C. 371, 22 U.S.C. 2778(b)(2), and 22 C.F.R. 127.1.* He was sentenced to 30 months' imprisonment and three years' supervised release. The court of appeals affirmed. Pet. App. 4a-5a.

1. The evidence at trial showed that in June 1988, petitioner, the president of Komex International, telephoned William E. DeArman, the project director at CIC International, a company involved with the defense industry and international trade. Petitioner requested a quotation on "ammunitions," specifically 105 and 106 millimeter ammunition. He followed up his telephone inquiry with a telefax reciting his requirements and stating that the end-user of the munitions would be the Republic of Korea. For a number of reasons, however, DeArman, a former United States Customs Agent, was suspicious of the inquiry. First, members of the defense industry were normally fluent in the pertinent arms nomenclature and would not have used the term "ammunitions." Second, 105 millimeter ammunition was not of a type commonly requested by a government. Third, there were several manufacturers located in Korea that could have supplied that type of material. Fourth, CIC International did not normally receive domestic

---

* Petitioner was acquitted on another count charging attempted exportation of nerve gas without a license. Gov't C.A. Br. 3.

requests for such material; rather, most inquiries came from its own agents or directly from foreign governments. Gov't C.A. Br. 5-6; see also C.A. App. 1.63-1.70, 1.78-1.80.

DeArman notified the United States Customs Service, which commenced an undercover operation. C.A. App. 1.67-1.68. Customs Agent Richard Kennan telephoned petitioner and introduced himself as Richard Moyes, the president of T & C Trading, which Kennan said was an export arm of CIC International. During the ensuing six months, petitioner and Kennan continued negotiations about the ammunition. Persons in the business of exporting defense articles must register with the Office of Munitions Control, and petitioner's company, Komex International, was registered with that Office during this time. Gov't C.A. Br. 6-7.

In July 1988, Kennan and petitioner met and discussed "silkworm" and TOW-2 missiles. Kennan claimed that he could obtain those items. Petitioner immediately mentioned Iran, and told Kennan that four years earlier he had made inquiries concerning TOW missiles on behalf of South Korea, which was interested in obtaining 400 missiles for Iran. Petitioner recounted that this activity had prompted a visit from the FBI, but that he had told the FBI that the missiles were for Korea. At a later meeting in August 1988, petitioner confirmed that the actual destination of the TOW missiles was Iran. Gov't C.A. Br. 9-10.

Later in August 1988, petitioner again contacted Agent Kennan. Petitioner stated that a customer needed 1250 missiles, but he expressed concern about the "illegality" of the order because the missiles were on the United States' Munitions List and therefore required an export license from the Office of Muni-

tions Control. An export license identifies, *inter alia*, the purpose for which the commodity is to be exported and the foreign "end-user." See Gov't C.A. Br. 7, 10. Petitioner suggested that he could obtain a phony end-user certificate, and Agent Kennan indicated that he could obtain a phony export license, which he said would cost either 1% of the total price or $50,000, whichever was less. Petitioner said that the $50,000 presented no problem. Kennan emphasized to petitioner that the license would not be legal, because it would be based on a phony end-user and because the arms would actually be going to Iran. Petitioner stated that the purchaser would use a third country that was friendly to the United States as the purported final destination. Petitioner eventually told Agent Kennan that he had made up his mind to go through with the TOW missile deal, and he later inquired about the availability of other products to sell to Iran, including stinger missiles and Varian tubes. *Id.* at 10-11.

In November 1988, Charles Caplan, of Domino Associates Holding Ltd. in London, asked whether petitioner could provide 500 units of the nerve gas Sarin for shipment to Iran. Petitioner promised to check. Having intercepted these communications, Agent Kennan told petitioner the next day that he had received a massive order for many items desired by Iran, including "chemical stuff like Sarin." C.A. Supp. App. 41; C.A. App. 2.22-2.23. Two days later, petitioner telefaxed a message to Caplan, stating that petitioner was scheduled to have dinner with "a business gentleman for your 500 ea." C.A. Supp. App. 46, 47; C.A. App. 2.26; Gov't C.A. Br. 11-13.

Shortly thereafter, petitioner met Agent Kennan for lunch. After discussing other matters, including

the ammunition, petitioner raised the subject of the Sarin. Kennan furnished petitioner information concerning available containers and prices. Petitioner suggested using a code name for the chemical in discussions and telefaxes. Shortly after lunch, petitioner informed Caplan by telefax that the product could be shipped within a month, and he asked Caplan to specify the desired container size. In December 1988, after additional contacts with Caplan, petitioner asked Kennan to procure 500 units of Sarin in a specified container. Kennan stated that he would need a 10% down payment in advance, which would include the cost of the phony export license. Petitioner also discussed financial arrangements for the deal that would yield him a profit of $2000 per unit, for a total of $1 million. Gov't C.A. Br. 13-15.

After petitioner had further conversations with Caplan and Kennan, petitioner and Kennan discussed the Sarin deal at length at a meeting on January 11, 1989. Kennan assured petitioner that he would procure an export license, but again he stated that the license would be "bogus." Petitioner suggested that the license identify the goods as "crankshafts," but Kennan pointed out that this subterfuge would not survive a cursory inspection and suggested that the license specify regular Mark 82 bombs. Toward the end of the meeting, the two men quarreled concerning the financial arrangements and shipping date. Petitioner told Kennan that his contacts in London were skeptical about Kennan because petitioner had not previously dealt with him. Petitioner wanted to complete the munitions deal first and delay the Sarin deal. Kennan did not want to proceed with the munitions deal because although the items were available, the financial arrangements for it would have placed

the Customs Service at risk of financial loss, and Kennan wanted to complete the Sarin investigation. Kennan accordingly told petitioner that, for cash-flow reasons, the Sarin deal had to be completed before the munitions deal. Petitioner, who did not want the two matters connected, insisted that petitioner first demonstrate his capability through the munitions deal. Gov't C.A. Br. 17-18.

Unable to resolve the matter, the two men parted. Within about an hour, however, petitioner telephoned Kennan twice and left a message for Kennan to call him. When Kennan returned the call, petitioner explained that he was doing what he could, that the timing of the Sarin deal was beyond his control, and that the earliest shipping date would be early February. Kennan asked for time to think about it, and he called petitioner again later that evening. They discussed both the Sarin deal and the munitions deal, as well as the possible shipment of anti-aircraft missiles, for which petitioner suggested getting a phony export license to permit quick shipment. Petitioner reassured Kennan that if he was patient, they would eventually make a lot of money. The two men agreed to talk the next day. On January 12, 1989, petitioner was arrested in Kennan's office. Gov't C.A. Br. 18-19.

2. The district court rejected petitioner's argument that the undercover operation established entrapment as a matter of law and violated the Due Process Clause. Pet. App. 6a-33a. Petitioner's contention that he was entrapped as a matter of law rested principally on the notion that he had withdrawn from the conspiracy at the January 11, 1989, meeting. *Id.* at 7a, 21a-22a. The court rejected this contention, observing that what transpired during the meeting and the "blow-up" between the two men, as well as petitioner's prior and subsequent actions,

were "hotly disputed by the parties and [were] for the jury to evaluate," *id.* at 21a, and "the jury found that [petitioner] was predisposed, and thus not entrapped." *Id.* at 7a. "Viewing the evidence in a light most favorable to the government," the court found "no basis to disturb the jury's determination that [petitioner] was not entrapped and did not withdraw from the conspiracy." *Id.* at 22a.

The district court likewise concluded, based on this Court's decisions in *United States* v. *Russell*, 411 U.S. 423 (1973), and *Hampton* v. *United States*, 425 U.S. 484 (1976), and an elaborate review of Third Circuit precedents, that petitioner did not have a viable due process claim. Pet. App. 18a-19a; see *id.* at 9a-21a. The court could not "find that the investigation was launched for an improper reason," in view of the suspicious nature of petitioner's initial inquiry to an official of CIC International. *Id.* at 19a. The court further observed that "[n]o authority now exists which would permit this court to find that the mere initiation of the investigation violated [petitioner's] due proces rights." *Id.* at 7a. Finally, the court concluded that because the government had offered sufficient evidence to support the jury's finding that petitioner "was an active participant in a plan to export Sarin without a legitimate license," this was not a case in which "the plan was completely initiated and operated by the government." *Id.* at 20a-21a.

3. The court of appeals summarily affirmed petitioner's conviction in an unpublished order, rejecting petitioner's entrapment and due process claims. Pet. App. 4a-5a.

ARGUMENT

1. Petitioner first contends (Pet. 7-14) that a government undercover investigation violates the Due Process Clause if the government does not have a "reasonable suspicion" for targeting the subject. This case, however, does not present that issue, since the record shows that the government had ample grounds for initiating an investigation of petitioner.

When petitioner telephoned DeArman at CIC International, DeArman, a former Customs agent, was justifiably suspicious of petitioner's intentions for a number of reasons. First, petitioner, unlike most members of the defense industry, was not conversant with the pertinent nomenclature. Second, petitioner was requesting, ostensibly on behalf of the Republic of Korea, a type of anti-personnel ammunition that was not normally requested by governments. Third, the Republic of Korea would have been able to obtain those munitions from its own manufacturers. Fourth, CIC International did not normally receive domestic inquiries for that type of munitions. Only when presented with this information did the Customs Service contact petitioner and explore his munitions activities. See C.A. App. 1.63-1.70, 1.78-1.80. Against this background, the district court properly concluded that the investigation was not launched without any predicate or for an improper reason. Pet. App. 19a. The course of the investigation of petitioner, culminating in the conspiracy for illegal exportation of Sarin, confirmed that the government's initial suspicion was well founded.

In any event, the courts of appeals have repeatedly rejected the due process contention petitioner advances here. As the Seventh Circuit recently concluded, "[t]he Constitution does not require the gov-

ernment to have a preexisting good faith basis for suspecting criminal activity before initiating an undercover investigation." *United States* v. *Miller*, 891 F.2d 1265, 1269 (1989); accord *United States* v. *Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (en banc); *United States* v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Jannotti*, 673 F.2d 578, 609 (3d Cir. 1981) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 940-941 (2d Cir.), cert. denied, 449 U.S. 956 (1980). Due process limitations "come into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (plurality opinion). Yet, as the Eighth Circuit has succinctly noted, a defendant has "no constitutional right to be free of investigation." *United States* v. *Jacobson*, 916 F.2d at 469. In other words, where "the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait." *United States* v. *Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988) (internal quotation marks and citation omitted).

Petitioner mistakenly relies (Pet. 8-14) on *United States* v. *Jacobson*, 893 F.2d 999 (8th Cir. 1990), and *United States* v. *Luttrell*, 889 F.2d 806 (9th Cir. 1989). The Eighth Circuit, sitting en banc, has reversed the panel's ruling in *Jacobson*, and thus "join[ed] with the courts of appeals that hold the constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation." 916 F.2d at 469. And the Ninth Circuit has recently ordered that *Luttrell* be reheard by the court en banc. *United States* v. *Lut-*

trell, 906 F.2d 1384 (1990). Accordingly, even if this case presented the question whether the government must have some measure of suspicion before targeting an individual for an undercover investigation, review of that question would be premature in this case because of the absence of any conflict among the courts of appeals.

2. Petitioner also argues (Pet. 14-19) that he was entrapped as a matter of law because the evidence failed to show that he had the requisite predisposition to commit the crime. This argument is completely without merit. As the evidence showed, petitioner had already sent military equipment (parts for the 20 millimeter "Vulcan" automatic weapon) to South Korea without a license between June 1986 and December 1988. C.A. Supp. App. 307-348. Although those parts were on the United States Munitions List, petitioner never obtained export licenses for the shipments. To be sure, petitioner testified that his conduct over that 18-month period was merely a mistake, but the jury was entitled to conclude otherwise, especially given petitioner's substantial experience in the munitions industry. Gov't C.A. Br. 24-25.

Moreover, petitioner admitted to Agent Kennan that he had helped South Korea circumvent Swedish laws prohibiting exportation of weapons from Sweden to a "conflict country." Although petitioner claimed that his conduct was appropriate because the Swedish Government actually wanted its laws to be violated, the jury was entitled to reject that explanation and to find that petitioner was predisposed to engage in illegal exportation. Gov't C.A. Br. 25. Furthermore, petitioner admitted to Kennan that he had investigated the procurement of 400 TOW missiles for Korea to send to Iran. C.A. Supp. App. 284-285. Because such an exportation would have vio-

lated the Arms Export Control Act, petitioner told Hughes Aircraft and the FBI that the end-user was Korea, thereby demonstrating his readiness to conspire to violate the Arms Export Control Act. C.A. Gov't Br. 26.

In addition, well before the negotiations concerning Sarin began in November 1988, petitioner enthusiastically embraced Kennan's proposal to obtain TOW missiles, and petitioner pursued a plan to obtain shipment of the missiles, with the ultimate destination of Iran. Petitioner first mentioned Iran; petitioner told Kennan that the ultimate destination would be Iran; petitioner suggested that he could obtain a phony end-user certificate; and he proposed code words to use in discussing the illegal transactions. In sum, the record refutes any suggestion that petitioner was entrapped as a matter of law. The district court therefore correctly permitted the jury to pass on his entrapment defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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